IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1663

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, ET AL., *Petitioners*

v.

PENSION BENEFIT GUARANTY CORPORATION, AND BREWERY WORKERS PENSION FUND, ET AL., *Respondents*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY MEMORANDUM

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Respondent Pension Benefit Guaranty Corporation (PBGC), in its Brief in Opposition, as an alternative basis for supporting the decision of the Court of Appeals, raises the question of the discretionary author-

ity of the PBGC to defer application of § 208 (29 U.S.C. § 1058) to multiemployer plans until such time as it issues regulations of general application. This question, while extensively briefed in the lower courts, was not reached by either of the courts. Nevertheless, a resolution of this question is essential to the ultimate disposition of the case.

Petitioner in this action seeks to compel the PBGC to assert jurisdiction under § 208 and determine whether the merger should be prohibited because of the devastating impact which it would have on the pension benefits of participants of the Teamsters pension fund. The PBGC defends on the ground that § 208 is not yet applicable to multiemployer plans since it has not yet issued regulations determining the extent to which § 208 covers multiemployer plans. Thus, while protection is available to single employer plans under § 208, it may not be invoked to protect employees who are participants in multi-employer plans.[1]

A crucial provision in furthering the Congressional policy of protecting plan participants against loss and diminution of benefits is found in § 208. This section sets forth the minimum standards that must be met before the two funds may merge. The Conference Com-

[1] There are now about 2,000 private defined benefit multiemployer plans, covering nearly 8 million participants. These plans account for less than 3 percent of all plans covered by the PBGC termination insurance, but contain over 20 percent of all participants in covered plans. Because of their relative size, even a few multiemployer terminations during a given year could have a significant impact on the guaranteed program. Pension Benefit Guaranty Corporation, Multiemployer Study required by P.L. 95-214 (July 1, 1978), page 20.

mittee Report accompanying ERISA states that § 208 is to apply to multi-employer plan mergers:

> . . . to the extent the [PBGC] determines those rules are necessary for the participants' protection. S. Rep. 93-1280, 93rd Cong., 2d Sess. p. 385.

Despite the PBGC's responsibility to protect pension plan participants from improvident mergers, the PBGC has not at any time in these proceedings expressed a single concern of the need of applying § 208 to protect the interest of multiemployer plan participants. Rather, PBGC supports its determination that § 208 is inapplicable by relying on the difficulties in promulgating regulations. Pending the issuance of regulations, it contends that § 208 is inapplicable to multiemployer plans. Almost 5 years have elapsed since the enactment of the statute. Regulations have not yet been issued determining the extent to which § 208 is applicable to multiemployer plans.

This court need not and, indeed, should not defer to the PBGC's interpretation of § 208. This court stated in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968):

> . . . the Courts are the final authorities on issues of statutory construction and are not obligated to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or frustrate the congressional policy underlying a statute. (Citation omitted)

See also *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 745-746 (1973); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Skidmore* v. *Swift & Co.*,

323 U.S. 134 (1944); and Davis, *Administrative Law* § 5.03, pp. 127-129 (3d Ed. 1972).

The PBGC has no authority to defer the effective date of § 208 to multiemployer plan mergers. Its effort to do so is a blatant violation of the Congressional mandate. The effective date of § 208 is unambiguously set forth in § 208 itself. The section provides that no merger or transfer of funds may take place after "enactment of this Act" without satisfying the § 208 standard. The Conference Report is similarly unambiguous. The report states:

> In the case of multiemployer plans, these rules [§ 208 test] are to apply only to the extent that the [PBGC] determines that these rules are necessary for the participant's protection. These rules are to apply to mergers or transfers made after the date of enactment of the bill, but the plan provision to this effect does not have to be adopted prior to January 1, 1976. S. Rep. 93-1280, 93d Cong., 2d Sess., p. 385.

The Conference Report also makes clear that the PBGC would have authority to defer application only upon a determination that "these rules are necessary for the participant's protection". No such determination has been made here. Instead PBGC, without any statutory authority, has deferred application of § 208 to multiemployer plans until such time as it becomes administratively feasible to issue regulations on the subject.

The legislative history reveals that neither the bills in the House or the Senate distinguished between single and multiemployer plans. The House bill, however, contained a provision deferring multiemployer plans for a period of up to 7 years. H.R. 2, 93rd Cong., 1st

Sess. (October 2, 1973) and H.R. 12855, 93rd Cong., 2d Sess. (February 19, 1974). The Senate bill did not contain a similar provision, and the House provision was rejected in conference in favor of the present provision that the PBGC would have authority to defer application only upon a determination that application of § 208 would not be necessary for protection of plan participants. Nevertheless, the PBGC in the Court of Appeals, relied on the House bill for its authority to defer application of § 208 to multiemployer plans. Plainly, reliance upon a rejected version of legislation is hardly sufficient to alter an unambiguous statutory provision. *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186 (1974); *National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F. 2d 689 at 706 (D.C. Cir. 1971); and *Bethlehem Steel Corp.* v. *Train*, 544 F. 2d 657 (3d Cir. 1976), *cert. den.*, 430 U.S. 975 (1977).

In *Connolly* v. *PBGC*, 581 F. 2d 729, 734 (9th Cir. 1978) the court discussed the applicability of ERISA to multiemployer plans. In support of its conclusion, the court, citing the legislative history, stated:

> The conferees had no intention whatsoever of treating workers in these [multiemployer] plans as "second class citizens" and are determined that benefits be fully protected to the statutory limits regardless of the type of plan involved.

The PBGC urges that it would administratively infeasible to apply § 208 since the benefit equivalency test of § 208 requires application of other provisions of the statute which have not yet been defined. Specifically, the PBGC asserts that before the benefit equivalency test can become applicable, it is necessary to promulgate other regulations relating to the termi-

nation insurance program, which requires substantial evaluations by experts of three agencies. Thus, it is urged that the complexity of the regulatory problems supports the denial of the protection of the Act.

The PBGC does not claim that there is any special difficulty in applying the benefit equivalency test to the instant merger since it is undisputed that the merger here would effect a substantial reduction in benefits and impose on the fund a liability in excess of $70 million. PBGC's contentions are apparently addressed to alleged difficulties in seeking to promulgate regulations covering the entire category of multiemployer plans, and not to a determination of the need to extend § 208 protection to the Teamster fund participants in this case.

The PBGC's argument is inherently suspect, since numerous ERISA statutory events require application of the same alleged complex provisions urged here as justifying deferring application of § 208 to multiemployer plans. Statutory events, such as the merger of a single employer plan (governed by § 208), terminations (governed by § 4041 (29 U.S.C. § 1341)), and assessment of employer liability upon termination (§ 4062 (29 U.S.C. § 1362)), all require that a plan be treated as terminated and that the available benefits be determined after application of § 4022 (guaranteed benefits, 29 U.S.C. § 1322) and § 4044 (allocation of assets, 29 U.S.C. § 1344). Yet, each of these provisions of Title IV became immediately applicable upon ERISA's enactment (§ 4082 (29 U.S.C. § 1382)) and have not been deferred.

The PBGC may not hold § 208 in abeyance until it issues regulations nor may it apply § 208 in such a way as to apply a blanket rule of inapplicability to multiemployer plans by asserting a plea of administrative infeasibility. *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655 (1973); *NRDC, Inc.* v. *Costle* [Feedlots case], 568 F. 2d 1369 (D.C. Cir. 1977); *Federal Land Bank Assn. of Asheville* v. *Commissioner of Internal Revenue,* 573 F. 2d 179 (4th Cir. 1978). In a review of the foregoing cases, the following principles are clear: (1) since the operation of § 208 is not expressly conditioned upon a formal regulatory scheme by the PBGC and the PBGC has only permissive authority to issue regulations and criteria, the operation of § 208 prohibitions cannot be held in abeyance until such time, if ever, as the PBGC issues regulations (*Pennsylvania Chemical, supra.*); (2) although the PBGC may have authority to determine the *extent* to which § 208's prohibitions are to apply to multiemployer plans, it *may not* seek to exempt the entire category of multiemployer plans from the substantive requirements of § 208 because of administrative infeasibility (*Feedlots, supra.*); and (3) since § 208 is cast in permissive terms respecting PBGC authority, the PBGC may not invoke a blanket rule of nonapplicability to multiemployer plans since this would convert § 208 into a mandatory statute excluding multiemployer plan mergers from coverage without any analysis or determination whatsoever as to whether application of § 208 was necessary to achieve the Act's purpose (*Federal Land Bank Assn., supra.*). In short, whatever discretion may be vested in the PBGC concerning the application of § 208 to a particular merger, the agency clearly does not have discretionary authority to ignore the statute and read the term multiemployer plans out of the Act.

The full implication of the PBGC refusal to apply § 208 to multiemployer mergers is manifest in the 1978 report which the PBGC submitted to Congress, *supra*. In this report the PBGC, in urging amendments to the multiemployer provisions of ERISA, stated with respect to § 208, that its application to multiemployer plans is "administratively unworkable", *supra* at page 120. Indeed, PBGC has made no effort to apply § 208 to multiemployer plans even in the most patent situation, requiring the application of § 208. This report, reflecting the action of the PBGC in this case, makes plain that the PBGC, without statutory authority, has administratively deleted multiemployer plan coverage from the protection afforded by § 208.

Respectfully submitted,

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